

AMENDED IN SENATE MAY 27, 2005

AMENDED IN SENATE APRIL 14, 2005

AMENDED IN SENATE FEBRUARY 16, 2005

## SENATE BILL

**No. 33**

### Introduced by Senator Battin

December 13, 2004

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An act to amend ~~Sections 285, Section 288.1, 1000.12 and 1203.066 of, and to repeal Section 1000.13 of, of~~ the Penal Code, relating to sexual abuse.

#### LEGISLATIVE COUNSEL'S DIGEST

SB 33, as amended, Battin. Child sexual abuse.

~~Existing law provides that it is a crime punishable by imprisonment in the state prison for persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void to commit fornication or adultery with one another.~~

~~This bill would provide that it is a crime punishable by imprisonment in the state prison for persons within specified degrees of consanguinity who are 14 years of age or older to commit fornication or adultery with one another.~~

Existing law provides that any person convicted of committing any lewd or lascivious act upon a child under 14 years of age shall not have his or her sentence suspended until the court obtains a report as to the mental condition of that person from a reputable psychiatrist or psychologist, or from a recognized treatment program.

This bill would also provide that if the defendant is a member of the victim's household, he or she shall not be granted probation unless they are removed from the victim's household until the court determines that the best interests of the victim would be served by his

or her return. This bill would also provide that while removed from the household, the court shall prohibit contact by the defendant with the victim, as specified.

~~Existing law provides that, in lieu of prosecuting a person suspected of committing an act of abuse or neglect involving a minor victim, the prosecuting attorney may refer that person for counseling and psychological treatment.~~

~~This bill would specify that these provisions only apply to a person suspected of committing physical abuse or neglect.~~

~~Existing law also provides that, in lieu of trial, the prosecuting attorney may make a motion to defer entry of judgment with respect to any crime charged in which a minor is a victim of an act of molestation or sexual abuse, upon written agreement between the prosecuting attorney and the suspect, if he or she is a family member of the victim, the person has no prior violent or sexual felony convictions, and no adverse diversion or counseling history, as specified, provided that rehabilitation is feasible, there is no threat of harm to the minor, the charged offense is not a lewd or lascivious act or any other sexual offense committed by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury, the defendant pleads guilty and completes an approved treatment program, 5 years after which, the court shall dismiss the charges against the defendant.~~

~~This bill would repeal these provisions.~~

~~Existing law provides that a person who is convicted of committing lewd and lascivious acts upon a child or engaging in continuous sexual abuse of a child, if the violation involved more than one victim; substantial sexual conduct with a victim who was under 14 years of age, or the use of obscene matter depicting sexual conduct, as specified, shall be ineligible for probation, a suspended sentence, nor shall any of the charges against him or her be dismissed, as specified, unless the court makes several findings including that the defendant is the victim's parent or relative, grant of probation is in the best interest of the child, rehabilitation of the defendant is feasible, and there is no threat of physical harm to the child.~~

~~This bill would instead provide that probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for any person convicted of committing these offenses if the existence of any fact required to prove the allegation is alleged in the accusatory pleading and either admitted by the defendant or found to be true by~~

~~the trier of fact. Further, for the existence of any fact relating to lewd and lascivious acts against multiple victims, in order for these provisions to apply, the allegation must specifically reference these provisions.~~

~~This bill would make other conforming changes.~~

~~Because this bill would increase local incarceration costs and change the punishment for a crime terms of probation, it would create a state-mandated local program.~~

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1     ~~SECTION 1. Section 285 of the Penal Code is amended to~~  
2     ~~read:~~

3     ~~285. Persons being within the degrees of consanguinity~~  
4     ~~within which marriages are declared by law to be incestuous and~~  
5     ~~void, who intermarry with each other, or who being 14 years of~~  
6     ~~age or older, commit fornication or adultery with each other, are~~  
7     ~~punishable by imprisonment in the state prison.~~

8     ~~SEC. 2.—~~

9     ~~SECTION 1. Section 288.1 of the Penal Code is amended to~~  
10    ~~read:~~

11    ~~288.1. (a) Any person convicted of committing any lewd or~~  
12    ~~lascivious act including any of the acts constituting other crimes~~  
13    ~~provided for in Part 1 of this code upon or with the body, or any~~  
14    ~~part or member thereof, of a child under the age of 14 years shall~~  
15    ~~not have his or her sentence suspended until the court obtains a~~  
16    ~~report from a reputable psychiatrist, from a reputable~~  
17    ~~psychologist who meets the standards set forth in Section 1027,~~  
18    ~~as to the mental condition of that person.~~

19    ~~(b) If the defendant is a member of the victim's household,~~  
20    ~~probation shall not be granted unless the defendant is removed~~  
21    ~~from the household of the victim until the court determines that~~

1 the best interests of the victim would be served by his or her  
2 return. While removed from the household, the court shall  
3 prohibit contact by the defendant with the victim, with the  
4 exception that the court may permit supervised contact, upon the  
5 request of the director of the court ordered supervised treatment  
6 program, and with the agreement of the victim and the victim's  
7 parent or legal guardian, other than the defendant. As used in this  
8 subdivision, "contact with the victim" includes all physical  
9 contact, being in the presence of the victim, communicating by  
10 any means, including by a third party acting on behalf of the  
11 defendant, or sending any gifts.

12 ~~SEC. 3. Section 1000.12 of the Penal Code is amended to~~  
13 ~~read:~~

14 ~~1000.12. (a) It is the intent of the Legislature that nothing in~~  
15 ~~this chapter deprive a prosecuting attorney of the ability to~~  
16 ~~prosecute any person who is suspected of committing any crime~~  
17 ~~in which a minor is a victim of an act of physical abuse or~~  
18 ~~neglect to the fullest extent of the law, if the prosecuting attorney~~  
19 ~~so chooses.~~

20 ~~(b) In lieu of prosecuting a person suspected of committing~~  
21 ~~any crime, involving a minor victim, of an act of physical abuse~~  
22 ~~or neglect, the prosecuting attorney may refer that person to the~~  
23 ~~county department in charge of public social services or the~~  
24 ~~probation department for counseling or psychological treatment~~  
25 ~~and such other services as the department deems necessary. The~~  
26 ~~prosecuting attorney shall seek the advice of the county~~  
27 ~~department in charge of public social services or the probation~~  
28 ~~department in determining whether or not to make the referral.~~

29 ~~(c) This section shall not apply to any person who is charged~~  
30 ~~with sexual abuse or molestation of a minor victim, or any sexual~~  
31 ~~offense involving force, violence, duress, menace, or fear of~~  
32 ~~immediate and unlawful bodily injury on the minor victim or~~  
33 ~~another person.~~

34 ~~SEC. 4. Section 1000.13 of the Penal Code is repealed.~~

35 ~~SEC. 5. Section 1203.066 of the Penal Code is amended to~~  
36 ~~read:~~

37 ~~1203.066. (a) Notwithstanding Section 1203 or any other~~  
38 ~~law, probation shall not be granted to, nor shall the execution or~~  
39 ~~imposition of sentence be suspended for, nor shall a finding~~  
40 ~~bringing the defendant within the provisions of this section be~~

1 stricken pursuant to Section 1385 for, any of the following  
2 persons:

3 (1) A person who is convicted of violating Section 288 or  
4 288.5 when the act is committed by the use of force, violence,  
5 duress, menace, or fear of immediate and unlawful bodily injury  
6 on the victim or another person.

7 (2) A person who caused bodily injury on the child victim in  
8 committing a violation of Section 288 or 288.5.

9 (3) A person who is convicted of a violation of Section 288 or  
10 288.5 and who was a stranger to the child victim or befriended  
11 the child victim for the purpose of committing an act in violation  
12 of Section 288 or 288.5, unless the defendant honestly and  
13 reasonably believed the victim was 14 years of age or older.

14 (4) A person who used a weapon during the commission of a  
15 violation of Section 288 or 288.5.

16 (5) A person who is convicted of committing a violation of  
17 Section 288 or 288.5 and who has been previously convicted of a  
18 violation of Section 261, 262, 264.1, 266, 266c, 267, 285, 286,  
19 288, 288.5, 288a, or 289, or of assaulting another person with  
20 intent to commit a crime specified in this paragraph in violation  
21 of Section 220, or who has been previously convicted in another  
22 state of an offense which, if committed or attempted in this state,  
23 would constitute an offense enumerated in this paragraph.

24 (6) A person who violated Section 288 or 288.5 while  
25 kidnapping the child victim in violation of Section 207, 209, or  
26 209.5.

27 (7) A person who is convicted of committing a violation of  
28 Section 288 or 288.5 against more than one victim.

29 (8) A person who, in violating Section 288 or 288.5, has  
30 substantial sexual conduct with a victim who is under 14 years of  
31 age.

32 (9) A person who, in violating Section 288 or 288.5, used  
33 obscene matter, as defined in Section 311, or matter, as defined  
34 in Section 311, depicting sexual conduct, as defined in Section  
35 311.3.

36 (b) “Substantial sexual conduct” means penetration of the  
37 vagina or rectum of either the victim or the offender by the penis  
38 of the other or by any foreign object, oral copulation, or  
39 masturbation of either the victim or the offender.

1     ~~(e) (1) Except for a violation of subdivision (b) of Section~~  
2     ~~288, this section shall only apply if the existence of any fact~~  
3     ~~required in subdivision (a) is alleged in the accusatory pleading~~  
4     ~~and is either admitted by the defendant in open court, or found to~~  
5     ~~be true by the trier of fact.~~

6     ~~(2) For the existence of any fact under paragraph (7) of~~  
7     ~~subdivision (a), the allegation must be made pursuant to this~~  
8     ~~section.~~

9     ~~SEC. 6.—~~

10     ~~SEC. 2.~~ No reimbursement is required by this act pursuant to  
11     Section 6 of Article XIII B of the California Constitution because  
12     the only costs that may be incurred by a local agency or school  
13     district will be incurred because this act creates a new crime or  
14     infraction, eliminates a crime or infraction, or changes the  
15     penalty for a crime or infraction, within the meaning of Section  
16     17556 of the Government Code, or changes the definition of a  
17     crime within the meaning of Section 6 of Article XIII B of the  
18     California Constitution.